Subject
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OGC REVIEW COMPLETED

Acting Administrative Officer, SI 13 January 1953

Office of the General Counsel

Employment of a Civil Service Annuitant over the age of 60 as a Consultant.

REFERENCE: Memorandum of Acting Administrative Officer, SI to General Counsel dated 8 December 1952, subject as above.

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1. The reference requests the advice of this office in determining the eligibility of [redacted] for employment by the Agency as a Consultant to OSI. [redacted] was retired by the Civil Service Commission for physical disability on 9 June 1952, and attained the age of 60 on 27 October 1952.

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2. 5 USC sec. 715(b) as amended by the Act of February 28, 1948, now provides with respect to a Civil Service annuitant in [redacted] situation that he shall not be "eligible again to appointment to any appointive office, position, or employment under the Government of the United States or the District of Columbia, unless the appointing authority determines that he is possessed of special qualifications: Provided, That no deductions for the retirement fund shall be withheld from the salary, pay, or compensation of such person, but there shall be deducted from his salary, pay or compensation otherwise payable a sum equal to the retirement annuity allocable to the period of actual employment: Provided further, That the annuity in such case shall not be redetermined upon such person's subsequent separation from the service."

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3. Under the foregoing section [redacted] would be eligible for reappointment if it is properly determined that he possesses "special qualifications."

4. Section 715(b) clearly provides that [redacted], being over the age of 60, will continue to receive his annuity for the period during which his services as consultant are utilized by this Agency. This raises the question, however, whether he may at the same time receive the full amount of compensation for his consultative services without the deductions required under the first proviso.

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5. The Comptroller General has said that "The purpose and intent of civil retirement legislation is (sic) entirely inconsistent with the dual payment of active service pay and civil retirement annuity to the same person for the same period of time." 14 Comp. Gen. 285 (October 6, 1934). The 1948 amendment to Section 715(b) authorized continued payment of the annuity in the case of annuitants over the age of 60 years with prorated deductions against the reemployment compensation. The Comptroller General has said that the ultimate effect of this amendment contemplated no change "in the original concept that a retirement status is inconsistent with an active employment status, and that no annuity should be paid in such cases." 28 Comp. Gen. 693, 695 (July 7, 1949).

In other words although from a paper work standpoint the Civil Service Commission continues payment of the annuity, the re-employing Agency must withhold proportionate amounts from the compensation it pays the annuitant.

6. It is apparent, therefore, that where the annuitant is appointed to an "appointive office, position or employment under the Government of the United States," appropriate deductions must be made from his reemployment compensation. However, this leaves unanswered the question whether the utilization of services as a consultant necessarily constitutes an appointment under Section 715(b).

7. Prior to the 1948 amendment to Section 715(b), the law had required suspension of annuity payments when a retired annuitant was receiving a "salary" in a position of reemployment with the Federal Government. "Salary" connoted compensation computed upon a time basis regardless whether the measure be the year, month, day or hour. Salary was to be distinguished from "fees", the inference being that a retired annuitant whose services were compensated on a fee basis was entitled to continue concurrently to receive his annuity and to retain his fees. See 25 Comp. Gen. 578 (January 15, 1946). The 1948 Amendment added the reemployment proviso to Section 715(b), necessitating allocable deductions from the reemployment "salary, pay or compensation."

8. In 26 Comp. Gen. 501, the Comptroller General construing the term "compensation" stated that in its generally accepted meaning it embraced both "fees" and "salary", as well as remuneration received in any other form for services rendered. This same opinion held, however, that despite the inclusiveness of the term "compensation", one who was employed as a consultant upon a fee basis did not hold a "civilian office or position" within the meaning of those words as used in Section 212 of the Economy Act (5 U.S.C. 59c). It is our opinion that this same reasoning should logically be extended to an interpretation of the meaning of the words "appointive office, position, or employment," in Section 715(b). Accordingly, we believe that when an individual receiving a civil service annuity performs services as a consultant for which he is compensated upon a true fee basis, completely unrelated to any measure of time, he is entitled to be compensated in full without prorated deductions from his consultant's compensation.

9. Inevitably, application of the foregoing considerations with respect to the differentiation of the fee basis from a time measure of compensation presents difficulties in practical administration. Analysis of a factual situation will sometimes develop that the fee basis has evolved into a form of per diem compensation. In such an eventuality, of course, withholdings in accordance with the proviso of section 715(b) are mandatory. In amplification of the opinion in 26 Comp. Gen. 501, cited above, the Comptroller General has said of the holding of that case that it "was not intended as excepting from the provisions of this said section 212 of the Economy Act all retired officers merely because of their employment designation, for administrative

purposes, as "consultants"—a title which necessarily implies the rendition of a certain amount of consultation services, comprising the expression of views and the giving of opinions and recommendations, but which does not necessarily limit the services to be rendered thereunder to such narrow confines. Rather, said holding was based upon the proposition that where the nature of the duties required is purely advisory, generally performed at infrequent intervals, and the compensation payable therefor is upon a fee basis, as distinguished from a purely time basis, the status of the employee is not such as could constitute the holding of an office or position within contemplation of Section 212. No particular one of the enumerated elements is considered as determinative of the matter. On the contrary, the absence of any one of such elements is sufficient to take a particular case out of the rule enunciated in that decision. 28 Comp. Gen. 381, 382 (December 29, 1948).

STATINTL 10. Paragraph 1 of the reference indicates your proposal to hire Mr. [redacted] on a WAE basis. If he is so hired, it would follow that deductions in accordance with the proviso of Section 715(b) should be made from his consultants' compensation. Mathematical computation of necessary withholdings should be coordinated with the appropriate Payroll Division.

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